86-573

Supreme Court, U.S.
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No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1985

THAN TUN, M.D., and
THIDA SWE TUN,

Petitioners,

vs.

KAUIKEOLANI CHILDREN'S HOSPITAL, a Hawaii nonprofit corporation, now known as **KAPIOLANI WOMEN AND CHILDREN'S MEDICAL CENTER**, a Hawaii nonprofit corporation; **et. al.**,

Respondents.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF HAWAII

PETITION OF THAN TUN, M.D., and THIDA SWE TUN FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a doctor whose hospital staff privileges have been either reduced, suspended or terminated by the peer review committees must first exhaust the hospital review process before seeking tort and contract damages against the hospital and peer review personnel on various theories of recovery, including civil rights and anti-trust violations.

2. Whether **HRS §663-1.7** immunizes the hospitals and their respective peer review personnel from liability to the petitioning doctor, where one group falsely accuses the doctor of incompetence and the other hospital acts upon the false report without independently ascertaining the truth of the report.

RESPONDENT PARTIES

KAUIKEOLANI CHILDREN'S HOSPITAL, a Hawaii nonprofit corporation, now known as **KAPIOLANI WOMEN AND CHILDREN'S MEDICAL CENTER**, a Hawaii nonprofit corporation; **KAPIOLANI WOMEN AND CHILDREN'S CENTER**; **RICHARD DAVI**, Individually and as president of Kapiolani Women And Children's Center; **PAUL E. COOK**, Individually and as Executive Vice-president of Kapiolani Women And Children's Center; **WALTER K. T. SHIM, M.D.**, Individually and as Chief of Staff of Kapiolani Women and Children's Center; **STANLEY M. K. CHUNG, M.D.**, Individually and as Chief of Surgery of Kapiolani Women And Children's Center; **THE QUEEN'S MEDICAL CENTER**, a Hawaii nonprofit corporation; **JON PEGG, M.D.**, Individually and as Chairman of Anesthesiology Credentials

Committee, The Queen's Medical Center; **DAN YOSHIOKA, M.D.**, Individually and as Chief of Anesthesia, and as a member of the Anesthesiology Credentials Committee, The Queen's Medical Center; and **ARTHUR SPRAGUE, M.D.**, Individually and as a member of the Anesthesiology Credentials Committee, The Queen's Medical Center; **JOHN DOES 1-50; JANE DOES 1-50; DOE CORPORATIONS 1-50; DOE ENTITIES 1-50**; and **DOE GOVERNMENTAL UNITS 1-50.**

MITSUO HATTORI, M.D. was originally a party Defendant, but is not a Respondent here because the Hawaii Supreme Court correctly reversed and remanded for further proceedings as against him.

Page

QUESTIONS PRESENTED FOR REVIEW.... i

RESPONDENT PARTIES..... ii

TABLE OF CONTENTS..... iv

TABLE OF AUTHORITIES..... vi

HAWAII SUPREME COURT OPINION..... 1

SUPREME COURT JURISDICTION..... 1

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULE INVOLVED..... 2

STATEMENT OF THE CASE..... 3

ARGUMENT..... 33

I. THE HAWAII SUPREME COURT OPINION AFFIRMING SUMMARY JUDGMENT FOR RESPONDENTS VIOLATES THE UNITED STATES SUPREME COURT OPINIONS, OTHER FEDERAL DECISIONS, AND ITS OWN PRIOR DECISION..... 33

II. EXHAUSTION OF HOSPITAL REMEDIES IS NEITHER REQUIRED NOR A PREREQUISITE WHERE THE PHYSICIAN IS SEEKING DAMAGES AND MOREOVER PROVES THAT THE HOSPITAL PEER-REVIEW PROCESS IS FUTILE..... 41

III. QUALIFIED IMMUNITY IS A QUESTION OF FACT TO BE RESOLVED AT THE TRIAL, NOT ON MOTION FOR SUMMARY JUDGMENT..... 57

CONCLUSION..... 64

APPENDIX..... App. 1

SUPREME COURT MEMORANDUM OPINION..... App. 1

ORDER DENYING MOTION FOR RECONSIDERATION..... App. 16

ORDER GRANTING DEFENDANTS' QUEEN'S MEDICAL CENTER, JON PEGG, M.D., DAN YOSHIOKA, M.D., AND ARTHUR SPRAGUE, M.D.'S MOTION TO DISMISS COMPLAINT FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED..... App. 17

AMENDED ORDER GRANTING MOTION FOR SUMMARY JUDGMENT AND DIRECTING ENTRY OF FINAL JUDGMENT..... App. 21

HAWAII REVISED STATUTES, §663-1.7..... App. 25

UNITED STATES CODE, Title 42, §1983..... App. 29

HAWAII RULES OF CIVIL PROCEDURE, RULE 56..... App. 30

TABLE OF AUTHORITIES

Cases: **Page**

ADICKES vs. S. H. KRESS AND COMPANY
398 U. S. 144, (1970)..... 34

AKU vs. LEWIS
52 Haw. 366, 477 P.2nd 162, (1972)... 57

ANTON vs. SAN ANTONIO COMMUNITY HOSPITAL
19 Cal.3rd 809, 140 Cal.Rptr. 442, 567 P.2nd 1162..... 53

ARIZONA vs. MARICOPA COUNTY MEDICAL SOCIETY
457 U.S. 332, (1982)..... 54

ASCHERMAN vs. PRESBYTERIAN HOSPITAL OF PACIFIC MEDICAL CENTER, INC.
507 F.2nd 1103, (9th Cir., 1974)..... 45

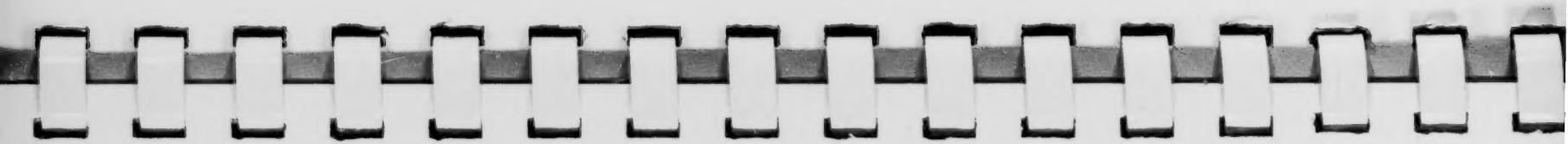
BEAMER vs. NISHIKI
66 Haw. 572, 670 P.2nd 1264, (1983)..... 34

BRIGHT vs. AMERICAN SOCIETY OF COMPOSERS, AUTHORIS AND PUBLISHERS
2 H.A. 471, 634 P.2nd 427, (1981).... 50, 51

CAFFERELLO vs. U. S. CIVIL SERVICE COMMISSION
625 F.2nd 285, (9th Cir., 1980)..... 50

CHIAFFITELLI vs. DETTMER HOSPITAL, INC.
437 F.2nd 429, (6th Cir., 1971)..... 45

COWAN vs. GIBSON
392 S.W.2nd 307, (Mo., 1965)..... 43



Cases: **Page**

CRUTCHFIELD vs. HART
2 H.A. 250, 630 P.2nd 124..... 38

DAMICO vs. CALIFORNIA
389 U.S. 416, (1967)..... 35

EIDELSON vs. ARCHER
645 P.2nd 171, (1982)..... 51

FORTNER ENTERPRISES, INC. vs. UNITED STATES STEEL CORP.
394 U.S. 495, (1969)..... 35

GARROW vs. ELIABETH GENERAL HOSPITAL AND DISPENSARY
79 N.J. 549, 401 A.2nd 533..... 51

GIBSON vs. BERRYHILL
411 U.S. 564, (1973)..... 48, 49

GLEN EDEN HOSPITAL, INC. vs. BLUE CROSS AND BLUE SHIELD OF MICHIGAN, INC.
740 F.2nd 423, (6th Cir., 1984)..... 37

HOSPITAL BUILDING CO. vs. TRUSTEES OF REX HOSPITAL
425 U.S. 738, (1976)..... 37

IN re MURCHISON
349 U.S. 133, (1955)..... 47

JACKSON vs. STATE OF MISSISSIPPI
644 F.2nd 1142, (1981)..... 39, 40, 60

LAUER vs. Y.M.C.A. OF HONOLULU
57 Haw. 390, 557 P.2nd 1334..... 34

Cases: **Page**

MISHLER vs. SAINT ANTHONY'S HOSPITAL SYSTEMS
694 F.2nd 1225, (10th Cir., 1981).... 39

MURPHY vs. MAUI PUB. CO.
23 Haw. 804, (1917)..... 62

PATSY vs. BOARD OF REGENTS OF THE STATE OF FLORIDA
457 U.S. 496, (1982)..... 44

POLLER vs. COLUMBIA BROADCASTING SYSTEM
368 U.S. 464, (1962)..... 35

QASEM vs. KOZAREK
716 F.2nd 1172, (7th Cir., 1983)..... 41, 42, 60, 62

SAMS vs. OHIO VALLEY GENERAL HOSPITAL ASSOCIATION
413 F.2nd 826, (4th Cir., 1969)..... 46

SILVER vs. CASTLE MEMORIAL HOSPITAL
53 Haw. 475, 497 P.2nd 564, (1972)... 32, 46, 54

SIMKINS vs. MOSES H. CONE MEMORIAL HOSITAL
323 F.2nd 959, (4th Cir., 1963), Cert. den., 376 U.S. 938..... 46

UNITED STATES vs. DIEBOLD, INCORPORATED
369 U.S. 654, (1962)..... 33, 34

VUCIECEVIC vs. MacNEAL MEMORIAL HOSPITAL
572 F.Supp. 1424, (N.D. Ill., 1983).. 39

Cases: **Page**

WEAVER vs. UNITED STATES
437 F.2nd 431, (8th Cir., 1971)..... 45

WEISS vs. YORK HOSPITAL
745 F.2nd 786, (3rd Cir., 1984)..... 54

WESTLAKE COMM. HOSP. vs. SUPERIOR COURT OF L.A. COUNTY
551 P.2nd 410, 131 Cal.Rptr. 90, (1976)..... 52

WHITE MOTOR COMPANY vs. UNITED STATES
372 U.S. 253, (1963)..... 36

WILLIS vs. SANTA ANNA COMMUNITY HOSPITAL ASSOC.
376 P.2nd 568, 26 Cal.Rptr. 640..... 51, 52

WOOD vs. STRICKLAND
420 U.S. 308, (1975)..... 59

Statutes: **Page**

United States Code

Title 28, Section 1257..... 32

Title 28, Section 1257(3)..... 1

Title 28, Section 1343..... 35

Title 42, Section 1983..... 4, 34, 35, 36, 44, 45, 46, 47

Statutes: **Page**

Hawaii Revised Statutes

Section 663-1.7..... 6, 14, 57, 59, 60

Section 663-1.7(b)..... 61

Section 663-1.7(c)..... 61

Section 663-1.7(d)..... 61

Rules: **Page**

Hawaii Rules of Civil Procedure

Rule 12(b)(1)..... 6

Rule 12(b)(6)..... 6, 7

Constitutional Provisions: **Page**

United States Constitution

Fourteenth Amendment..... 47

HAWAII SUPREME COURT OPINION

The unpublished memorandum opinion, **TUN vs. KAUIKEOLANI CHILDREN'S HOSPITAL, et. al.** is included in the Appendix, (App. 1 - 15).

SUPREME COURT JURISDICTION

The Opinion of the Supreme Court of the State of Hawaii was entered on June 17, 1986. A timely Motion for Reconsideration was denied without argument on July 7, 1986. The Judgment on Appeal of the Supreme Court of the State of Hawaii was entered on August 19, 1986. The jurisdiction of the Court is invoked under **28 U.S.C. §1257(3).**

CONSTITUTIONAL PROVISIONS, STATUTES AND RULE INVOLVED

Fifth Amendment to the United States Constitution:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces,

or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment to the United States Constitution:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Hawaii Revised Statutes, §663-1.7:
(See Appendix 25 - 28)

United States Code, title 42, §1983:
(See Appendix 29)

Hawaii Rules of Civil Procedure, Rule 56:
(See Appendix 30 - 33)

STATEMENT OF THE CASE

The Pleadings and Proceedings

On August 13, 1984, the Petitioners, hereinafter referred to as "Tun", filed their Complaint in the Circuit Court of the First Circuit against numerous defendants, of which the Defendants Kauikeolani Children's Hospital, Kapiolani Women and Children's Medical Center, Kapiolani Women and Children's Center, hereinafter referred to as Kapiolani, Richard Davi, Paul E. Cook, Walter K. T. Shim, Stanley M. K. Chung and Mitsuo Hattori were joined as Defendants (R 1-24). [R refers to Record on Appeal at the designated page, to be certified by the Clerk of the Hawaii Supreme Court.] Other defendants were Queen's Medical Center (Queen's), Doctors Jon Pegg, Dan Yoshioka and Arthur Sprague. Then on August 22, 1984, the First Amended Complaint for

Damages was filed (R 25-48), which is summarized as follows. Dr. Tun contends that all Defendants acted jointly and severally in causing his damages arising out of an occurrence date on or about October 20, 1982, in which Tun's medical privileges were reduced at Queen's as a result of derogatory information received from Dr. Hattori on that date. All counts of the Amended Complaint seek substantial monetary damages on multiple legal theories, generally summarized as defamation, infliction of emotional distress, interference with business relations, conspiracy to violate Federal and State antitrust laws, abuse of process, deprivation of due process and civil rights in violation of **42 U.S.C. §1983**, plus breach of contract.

Petitioners sought a jury trial for substantial general, special and punitive

damages plus injunctive relief from the wrongs suffered, together with attorney's fees and costs (R 45-46).

Paragraph 25 of the Amended Complaint alleges that Dr. Hattori told Dr. Tun he would never obtain privileges as a result of Hattori's opposition; thus Dr. Tun believed it was futile to proceed with his application at Kapiolani (R 33).

Malice of the Respondents was alleged in Paragraph 78 of the amended complaint (R 45).

To this Amended Complaint, Respondents Kapiolani, Davi and Cook separately answered (R122-126). Drs. Shim and Chung also separately answered (R 151-155). Both answers are basically identical raising numerous factual and legal defenses of contributory negligence, assumption of risk, privilege and immunity, failure to mitigate damages,

failure to exhaust adminsitrative remedies, truth, and statute of limitations.

Both answers, including Dr. Hattori's answer, deny Paragraph 25 of the Amended Complaint because they are without sufficient information to either admit or deny Paragrah 25 (R 61, 125, 153).

The Queen's Case:

To the Amended Complaint, the Respondents Queen's, Pegg, Yoshioka and Sprague moved for a Dismissal for failure to state a claim upon which relief can be granted under **Rule 12(b)(1)** and **(6)** of the **Hawaii Rules of Civil Procedure (HRCP)**, because Plaintiff Tun failed to exhaust his administrative remedies and that the Defendants further were immune from civil liability by virtue of **HRS §663-1.7** because Drs. Pegg, Yoshioka and Sprague

are members of a Peer Review Committee at Queen's (R 71-121).

Honorable Frank T. Takao, the Court, considering affidavits in support of and in opposition, granted the motion dismissing the Complaint with prejudice, because the Petitioners had not exhausted their administrative remedies. This was in essence granting a summary judgment motion as per **Rule 12(b)(6), Hawaii Rules of Civil Procedure.**

The Kapiolani Case:

On January 8, 1985, Kapiolani, Davi, Cook, Shim and Chung filed their Motion for Summary Judgment (R 184-314), which was joined by Dr. Hattori on January 21, 1985 (R 315-334). Their respective motions and memoranda were amended (R 350-359) and supplemented (R 361-372), and those matters finally came on for hearing before the Honorable Edwin H. Honda on

February 19, 1985, at which time the Court granted the Motions for Summary Judgment "as to both the hospital and its related auxiliary personnel or the staff personnel, as well as Dr. Hattori" (T 22). T refers to the Transcript, and page from the February 19, 1985, hearing.] At that time the Court reasoned that "The Court may question a little bit about some of the procedures, but I think that eventually, your client, if nothing else, has seen fit not to pursue his administrative remedies; I don't think that under the facts of the case, that you can say that appeal would have been precluded." (T 22-23).

Accordingly, the Court entered judgment granting the Motions for Summary Judgment for Kapiolani, Messrs. Davi, Cook and Drs. Shimm and Chung, and Dr. Hattori (2R 13-17).

Tuns timely appealed to the Hawaii Supreme Court from that final judgment. The Memorandum Opinion decided the exhaustion and immunity issues adverse to Petitioners, except they reversed and remanded the case as to Dr. Hattori (App. 1 - 15).

The Evidence

Stating the evidence and inferences reasonably drawn therefrom in the light most favorable to the Tuns, the following facts were before the trial court and the Hawaii Supreme Court on the Motions for Summary Judgment.

The Queen's Case:

As per affidavits of Drs. Bolian and Pegg, the Queen's version of the facts is stated chronoligically. On June 17, 1982, Dr. Tun applied for privileges in anesthesiology at Queen's. In so doing, Tun agreed to abide by the constitution

and bylaws and the policies of Queen's and acknowledged receipt of a copy of the constitution and bylaws (R 89). On June 18, 1982, Tun was granted temporary clinical privileges in anesthesiology with observation, which does not confer staff membership designation as per the bylaws. Tun was further granted a temporary privilege without observation on July 12, 1982, effective until August 10, 1982, pending further receipt of references and; accordingly, his temporary privileges were extended in thirty-day increments through November 1, 1982 (R 90).

As part of the Queen's review process, information was received as per Tun's release authorization concerning Dr. Tun's history of hospital privileges in July - October, 1977. As a result, on October 22, 1982, in response to the questionnaire, Kapiolani indicated that

Dr. Tun had not satisfactorily completed his observation and probation requirements, with a statement indicating that Dr. Tun was not "ready to give anesthesia for children unless he seeks further training in the field of pediatric anesthesiology" (R 91-92). Following that, on October 29, 1982, Tun's temporary clinical privileges were granted at Queen's to handle adult cases without observation and anesthesiology for newborn and pediatric cases, with observation (R 92). This status continued through May 1, 1983 (R 93).

On April 4, 1983, Tun was advised that his application for anesthesiology credentials would be approved on adult cases, without observation, and on pediatric cases under age 10 with observation for a minimum of two cases at Queen's involving the use of the general

inhalation anesthetic technique (R 93). After being advised of his right to an informal hearing concerning the restriction on his privileges, on October 4, 1983, he met with the Credentials Committee to clarify the matters at question, and the Committee recommended that his application for privileges be denied (R 94). On February 2, 1984, the Medical Executive Committee reviewing Dr. Tun's application for privileges accepted the recommendation of the Credentials Committee that his application be denied (R 94).

On February 21, 1984, Tun was advised of his right to an informal hearing concerning the denial of his application, which hearing was finally scheduled on October 30, 1984 (R 95). The affidavit further stated that his membership and clinical privileges at Queen's "has not

been completed" and that "Dr. T. Tun's application for staff privileges is incomplete" (R 95-96).

Dr. Jon Pegg (R 116-118) generally says that all the actions taken by the Committee and by himself were done in good faith and without malice or ill will. He further states that the decisions of that Committee were based upon the "independent medical and ethical judgments made in the best interests of patient care according to professional standards" (R 118).

The affidavit of Dr. Than Tun (R 143-146) in opposition to the Motion to Dismiss provides that he is a physician licensed to practice medicine in the State of Hawaii and is Chief of Anesthesiology at Wahiawa General Hospital. On June 15, 1982, he applied for clinical privileges in anesthesiology at Queen's and was granted temporary clinical privileges with

observation on June 18, 1982, and without observation on July 12, 1982, through November 1, 1982. On October 29, 1982, his privileges were reduced for newborn and pediatric cases requiring observation, which reduction was without written charges and without any hearing prior to reduction of his privileges (R 144). This reduction of privileges for newborns and pediatric cases requiring observation was based on a response from Kapiolani. The action reducing his Queen's privileges was taken without any investigation on the part of Queen's and contrary to the provisions of **HRS §663-7.1** (sic) (R 144).

The Tun affidavit further states the reduction of privileges by Queen's violated **HRS §663-7.1** (sic), in that the Board of Medical Examiners were not notified that his privileges had been reduced (R 144).

On October 4, 1983, he met with the Anesthesiology Credentials Committee and was questioned about an apparent discrepancy in his answer to one of his questions regarding whether he had his privileges suspended, restricted, revoked, or denied at Kapiolani, and his response was that he had withdrawn his application for privileges at Kapiolani on August 13, 1982; hence, as of September 29, 1984, his privileges were not so restricted. Following that, the Credentials Committee offered him limited privileges if he would state that he answered the questionnaire as he did because he misunderstood the question. This he refused to do. Whereupon, the Credentials Committee recommended that his privileges be denied on November 2, 1983, which was accepted by the Medical Executive Committee on February 2, 1984 (R 145).

As a result of the foregoing, Queen's acted in such a manner that it left no doubt that to continue with their administrative procedures would be futile. He said that Queen's reduction of his privileges without investigation constitutes malice on the part of Queen's and Drs. Pegg, Yoshioka and Sprague and that his only recourse against them was to file suit (R 145). All of this caused him great financial loss, loss of reputation, emotional stress and strain to him and his family (R 146).

Queen's Hospital admitted to receiving construction funds under the Hill-Burton Act and has received both Federal and State funds under Medicare/Medicade programs. Moreover, it is a nonprofit hospital, exempt from certain Federal and State taxation and is

further affiliated with the University of Hawaii Medical School (R 88).

None of the affidvits by any of the peer-review personnel established any independent investigation by any of them or any hosital group to determine from the charts and other medical evidence at Kapiolani whether, in fact, the patient upon which Dr. Tun was administering anesthesia ever suffered a cardiac arrest. All affidavits clearly indicate they were relying upon whatever Dr. Hattori told them. Dr. Tun's affidavits clearly refute the Dr. Hattori version of what happened to the patients on July 7, 1982.

The Kapiolani Case:

Dr. Tun has been a physician for many years, having performed over 5,000 anesthesia cases since 1977, including hundreds of pediatric cases and presently is Chief of Anesthesiology at Wahiawa

General Hospital. On June 23, 1982, he was granted temporary privileges for anesthesiology at Kapiolani and was observed in the operating room. Dr. Hattori observed him on July 3, 1982 and stated in a report that it was difficult to judge his performance from a short procedure; however, on July 7, 1982, another surgeon, Dr. Tan, during the course of performing a meatotomy, reported that "the patient tolerated the procedure well and left the operating room in satisfactory condition". For the same operation, Dr. Hattori reported that the patient had a "mild laryngospasm and bradycardia". Dr. Hattori's report was false, since the heart rate was 82 and bradycardia occurs when the rate is 60 or below and there was no laryngospasm. Dr. Hattori also reported in that surgery that "there was poor preparation. No muscle

relaxant or atropine prepared in syringes". These statements were also false. In that surgery, Dr. Hattori was upset because Dr. Tun was late due to an emergency surgery at Queen's (R 345).

In a second operation observed by Dr. Hattori on July 7, 1982, the surgery was cancelled because Dr. Hattori improperly diagnosed a cardiac arrest and initiated CPR unnecessarily because Dr. Hattori never checked the pulse of the patient when, in fact, there was a pulse. As such, it is a medical impossibility to have a cardiac arrest when the patient has a pulse. All the medical facts from that surgery deny the possibility of a cardiac arrest. Consequently, Dr. Hattori's observation report was totally false when he reported a cardiac arrest. Dr. Hattori's actions placed the patient in a life-threatening situation in attempting

to administer CPR to a patient that had a pulse (R 346).

As a result of what occurred on July 7, 1982 concerning Dr. Hattori's false reports, Dr. Tun determined that he could never successfully work at any hospital where Dr. Hattori was Chief of Anesthesiology. Further, as a result of the false reporting by Dr. Hattori, Dr. Tun's privileges at Kapiolani Hospital were summarily suspended; however, Dr. Tun chose to withdraw his application for privileges rather than go through the appellate procedure, since he felt it would be futile inasmuch as Dr. Hattori was falsely accusing Dr. Tun of malpractice. Dr. Tun felt that the power structure at the hospital would side with Dr. Hattori and that it would be futile to proceed any further at that hospital (R 346-347).

All of the actions taken by Dr. Chung, Dr. Shim and Mr. Cook and Mr. Davi are based upon the false report of Dr. Hattori without any investigation on their own into the truth of such reports, since none of those men asked him for his version of what happened before he was summarily suspended and his privileges revoked.

As a result of the foregoing, Dr. Tun's privileges at Queens were revoked when Dr. Hattori informed them falsely that Dr. Tun was not qualified to do pediatric cases unless he received further training elsewhere. This caused severe economic hardship to the Plaintiff, causing him to file a petition for bankruptcy, all to his damage (R 347).

In support of their Motion for Summary Judgment, Defendants Kapiolani,

Drs. Shim and Chung and Messrs. Davi and Cook offered the following evidence.

Dr. Tun was granted temporary privileges at Kapiolani on June 23, 1982, except that "newborn anesthesia and cardiovascular anesthesia privileges are not approved at this time, pending receipt of documentation of training/experience in those areas" (R 287-289). July 7, 1982 observation by Dr. Hattori showed that the surgery was cancelled because of a cardiac arrest. Dr. Hattori initiated CPR immediately when he observed that the patient was cyanotic and ventricular fibrillation occurred. Dr. Hattori stated that the pupils were dilated after successful defibrillation and reacted to light sluggishly. Accordingly, Dr. Hattori stated: "I don't think that he should be doing any pediatric cases in

this hospital unless he seeks further training elsewhere." (R 290).

Apparently upon receipt of the report from Dr. Hattori, Dr. Tun's temporary privileges were terminated immediately on July 9, 1982 in view of two unacceptable anesthetic cases performed at Kapiolani (R 291). On July 9, 1982, Dr. Chung reported the observation by Dr. Hattori to Mr. Davi as president of Kapiolani (R 292). His recommendation was that Dr. Tun's temporary privileges be terminated immediately and that no further privileges be granted at that hospital. Dr. Chung was Chief of Surgery at that time. As a result of those communications, the Credentials Committee met on July 13, 1982 and reversed the Executive Committee's recommendation to approve provisional privileges in anesthesiology for Dr. Tun

and recommended that no privileges be granted Dr. Tun (R 293).

On July 27, 1982, the Medical Executive Committee agreed to reject Dr. Tun's application for provisional privileges in anesthesiology based on the report from Dr. Chung (R 294). On July 28, 1982, Mr. Cook advised Dr. Tun of the Medical Executive Committee's action rejecting his application for medical staff membership and credential privileges (R 295).

On August 13, 1982, Dr. Tun withdrew his appliction for privileges at Kapiolani (R 296),which construed Dr. Tun's August 13, 1982 letter to be a waiver of his right to a hearing following notification of the Medical Executive Committee's recommendations (R 297). On October 14, 1982, Dr. Tun's attorney again advised Kapiolani that Dr. Tun was withdrawing his

application for hospital privileges (R 298-299). Nevertheless, the hospital continued to advise Dr. Tun of his appeal rights (R 300). Following that and correspondence from Dr. Tun's attorney, the hospital again advised Dr. Tun that he had waived his appellate rights (R 303).

On October 20, 1982, Dr. Hattori, as Chief of Anesthesiology at Kapiolani, in response to the Queen's inquiry, advised Queen's that Dr. Tun's provisional privileges at Kapiolani were denied following termination of his temporary privileges and the final denial was done by the Board on 9/82. Moreover, Dr. Hattori stated: "I don't believe Dr. Tun is ready to give anesthesia for children unless he seeks further training in the field of pediatric anesthesiology." (R 304).

It is noteworthy that in all of the evidence submitted there is no showing that the Board at Kapiolani nor any of the Credentials Committee members made any independent examination of the medical charts and records or contact with Dr. Tun to find out his version of what happened on the July 7, 1982 surgery which Dr. Hattori falsely reported according to the Affidavit of Dr. Tun. According to the Affidavit of Richard Davi, since Dr. Tun never availed himself of any right of review of appeal provided in the bylaws and, moreover, the decisions of the various committees for the hospital rely upon the medical expertise of the doctors who have staff privileges at Kapiolani as to the competency of physicians applying for privileges at that hospital (R 241). The inference is that since Dr. Tun did not avail himself of the appellate process

in the hospital, there was no need for the hospital committees to independently inquire of Dr. Tun what his version of the facts was; so, accordingly, they relied on Dr. Hattori's observation of the two procedures on July 7, 1982 without any further inquiry.

According to Dr. Chung, he acted upon the oral report from Dr. Hattori regarding Dr. Tun's two procedures observed on July 7, 1982 and in reliance on that report, Dr. Tun's privileges were revoked and no further privileges were granted (R 245-246). Likewise, Dr. Shim, a member of the Credentials Committee and Chairman of the Medical Executive Committee, verified that the actions of both committees were based upon the report from Dr. Hattori who felt that Dr. Tun should not have any privileges at Kapiolani (R 247-248). According to Dr. Hattori, all of his

observations and reporting to the peer review process was pursuant to Hawaii law. He responded to the Queen's questionnaire to Kapiolani concerning Dr. Tun's privileges and that he answered the quesionnaire on behalf of Kapiolani (R 330). He denied personally filing any complaint with the State of Hawaii Board of Medical Examiners concerning Dr. Tun but was merely subpoenaed to testify as to his observations of the two procedures performed by Dr. Tun (R 331). He further states in another Affidavit (R 311), that he has staff privileges at Queen's but does not serve on Queen's Medical Executive Committee or their Board of Trustees (R 311). Dr. Hattori goes on to state in one of his Affidavits that at all times relevant herein, he was not an employee, agent or servant of either Kapiolani or Queen's (R 310), but that he

was acting as a private individual and physician (R 310). He further states that he is not a member of the Board of Trustees of Kapiolani and his only participation in that Board's decision was to report his observations of the June 7, 1982 procedures performed by Dr. Tun (R 311). Dr. Hattori's other Affidavit (R 329-331) says that he is not a member of the Medical Executive Committee nor the Board of Trustees at Kapiolani, but that, given his position as Chief of Pediatric Anesthesiology, he filled out the questionnaire on behalf of Kapiolani (R 330). He further stated that, because of his position of Chief of Pediatric Anesthesiology, he sits on the Surgical Executive Committee at Kapiolani which makes recommendations to the Medical Executive Committee, both committees being peer review committees established

pursuant to Hawaii law (R 330). He says that he informed the other members of the Surgical Executive Committee and the Medical Executive Committee about his observations on the two procedures performed by Dr. Tun on July 7, 1982 and that, based upon those observations, he concluded that "Dr. Tun needed further training in pediatric anesthesiology before being allowed to perform anesthesia for children" (R 329).

Based upon the evidence, the pleadings and argument including the various memoranda, the trial court granted the Respondents' Motions for Summary Judgment (T 22) and entered judgments accordingly (R 373-376) and amended the same to include Dr. Hattori (2R 13-17).

The Supreme Court of Hawaii held that since Dr. Tun did not exhaust his available administrative remedies through

the hospitals, he was precluded from recovering any damages against the hospitals and their review personnel and, moreover at least as to Kapiolani, they were immune from any civil liabilities claimed by Dr. Tun and his wife; hence, the summary judgment motions were properly granted. However, the Court correctly held that as to Dr. Hattori, he was not immune and the failure to exhaust the administrative remedies defense was not available to him; hence, the summary judgment in his favor was reversed and remanded for proceedings consistent with that opinion (App. 1 - 15).

The Hawaii Supreme Court denied Petitioners' Motion for Reconsideration on July 7, 1986, with the Judgment on Appeal being entered August 19, 1986 affirming the Summary Judgment as to all Defendants except Dr. Hattori, against whom his

Summary Judgment was reversed and remanded for further proceedings against Dr. Hattori.

This Court has jurisdiction pursuant to **28 U.S.C. §1257** from the final Judgment entered July 7, 1986, affirming the granting of the Summary Judgment against Petitioners dismissing Petitioners' claims against Respondents.

The constitutional issues were raised first in the Amended Complaint by Petitioners contending Respondents violated their constitutional rights (R 34, 36, 37 and 42). Constitutional issues were likewise raised in the Hawaii Supreme Court in both Opening and Reply Briefs filed by Petitioners, in that the hospital and peer-group doctors violated the procedural due process requirements of **SILVER vs. CASTLE MEMORIAL HOSPITAL**, 53 Haw. 475, 497 P.2nd 564, (1972). These

issues were also raised in the Motion for Reconsideration filed June 27, 1986. However, the Hawaii Supreme Court found no violation of the due process requirements and that the evidence was insufficient to prove the futility of exhausting the hospital administrative remedies, plus the hospitals were immune anyway, consequently no liability existed, and Summary Judgment was appropriate.

ARGUMENT

I. THE HAWAII SUPREME COURT OPINION AFFIRMING SUMMARY JUDGMENT FOR RESPONDENTS VIOLATES THE UNITED STATES SUPREME COURT OPINIONS, OTHER FEDERAL DECISIONS, AND ITS OWN PRIOR DECISION.

In reviewing lower court decisions on summary judgment motions, the appellate court reviews the case de novo, **UNITED STATES vs. DIEBOLD, INCORPORATED**,

369 U.S. 654, (1962). In so doing, the evidence is viewed in the light most favorable to the party opposing the motion. These rules are well recognized in Hawaii, **BEAMER vs. NISHIKI**, 66 Haw. 572, 670 P.2nd 1264, (1983).

In spite of these rulings and other Hawaii authority such as **LAUER vs. Y.M.C.A. OF HONOLULU**, 57 Haw. 390, 557 P.2nd 1334, the Hawaii Supreme Court determined erroneously from the record that there was no genuine issue as to any material fact and that Respondents were entitled to a dismissal as a matter of law. Such decision violates **ADICKES vs. S. H. KRESS AND COMPANY**, 398 U.S. 144, (1970), which held in a civil rights case under **42 U.S.C. §1983**, that summary judgment was inappropriate since the movant had the burden of proving the absence of a genuine issue as to any

material fact. Likewise, **DAMICO vs. CALIFORNIA**, 389 U.S. 416, (1967), held that it was reversible error for the three-judge District Court to dismiss petitioner's complaint charging violations of **42 U.S.C. §1983** and **28 U.S.C. §1343** because the apellants failed to exhaust their adequate administrative remedies.

Other Supreme Court opinions clearly hold that summary judgment is not appropriate in civil antitrust actions in which damages and injunctive relief are sought, **FORTNER ENTERPRISES, INC. vs. UNITED STATES STEEL CORP.**, 394 U.S. 495, (1969). **POLLER vs. COLUMBIA BROADCASTING SYSTEM**, 368 U.S. 464, (1962), reversed and remanded the summary judgment for defendants in an action to recover treble damages for civil violations of the Sherman Antitrust Act. In so holding, the Court said, at Page 473:

> "We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross examination that their credibility and the weight to be given their testimony can be apprised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of "even handed justice"."

Summary judgment for the defendants was likewise reversible error in a civil antitrust suit in **WHITE MOTOR COMPANY vs. UNITED STATES**, 372 U.S. 253, (1963). Thus, trial in complex cases is clearly the due-process solution rather than summary judgment by affidavit.

There is no question that the Petitioners' Amended Complaint charged violations of both civil rights acts, **42 U.S.C. §1983**, and the Sherman Antitrust Act; consequently, the foregoing decisions mandate that the summary judgment motions

should have been denied. The standard for granting summary judgment is even more rigorous in antitrust litigation, **HOSPITAL BUILDING CO. vs. TRUSTEES OF REX HOSPITAL**, 425 U.S. 738, (1976).

In the context of hospital litigation, again we find that motions for summary judgment by the defendants are looked upon with disfavor, particularly where discovery has not been completed, **GLEN EDEN HOSPITAL, INC. vs. BLUE CROSS AND BLUE SHIELD OF MICHIGAN, INC.**, 740 F.2nd 423, (6th Cir., 1984). There the Court held the District Court abused its discretion in failing to permit the plaintiff to conduct further discovery to oppose the motion for summary judgment. In the case at bar, the Amended Complaint had been filed, answers filed, and then the motions for summary judgment came on without any discovery whatever; only

affidavits were used in support thereof and in opposition thereto. There were numerous issues of fact remaining, all of which the Hawaii Supreme Court said should have been resolved in the hospital administrative process. As will be pointed out more specifically in the second part of this argument, that likewise was clear error. Petitioners had argued on the appeal that, contrary to **CRUTCHFIELD vs. HART**, 2 H.A. 250, 630 P.2nd 124, where they did not have an adequate opportunity to conduct and conclude discovery on the principal issues in the lawsuit, summary judgment was totally inappropriate. This argument and the clear holdings of the foregoing cases obviously were not sufficient to convince the Hawaii Supreme Court that the trial court was in error.

Other courts have agreed that summary dismissal of antitrust claims against hospitals and their personnel are inappropriate without further discovery or trial, **MISHLER vs. SAINT ANTHONY'S HOSPITAL SYSTEMS**, 694 F.2nd 1225, (10th Cir., 1981), and **VUCIECEVIC vs. MacNEAL MEMORIAL HOSPITAL**, 572 F.Supp. 1424, (N.D. Ill., 1983). In the **Vuciecevic** case, a physician sued the public health care facility and professional corporation claiming the defendants engaged in a conspiracy and boycott in restraint of trade and national origin employment discrimination. The Court held that "the granting of the summary judgment for the defendants is precluded as premature". The same can be said in the case at bar. Even where qualified immunity is a defense issue in a §1983 action, summary judgment is not appropriate, **JACKSON vs. STATE OF**

MISSISSIPPI, 644 F.2nd 1142, (1981). this is so because the qualified immunity granted by a statute or case law is to be determined by both a subjective and an objective test which can only be ultimately resolved at a trial on the merits, not on affidavits.

Accordingly, it is respectfully submitted that the Hawaii Supreme Court not only failed to follow the holdings of this Court, but it didn't even follow its own prior opinions on summary judgment motions in complex cases which, as per its own memorandum opinion, involve civil damages for multiple causes of action such as defamation, violation of due process, conspiracy to deny constitutional rights and restrict interstate business, infliction of emotional distress, malicious prosecution and abuse of process, breach of contract, negligence,

unfair and deceptive trade practices, and violation of the Federal and State antitrust provisions. Instead, the Court chose to decide the case on exhaustion of administrative remedies and immunity issues. This in and of itself could constitute a deprivation of due process and equal protection of the laws when considering the United States Supreme Court opinions cited herein.

II. EXHAUSTION OF HOSPITAL REMEDIES IS NEITHER REQUIRED NOR A PREREQUISITE WHERE THE PHYSICIAN IS SEEKING DAMAGES AND MOREOVER PROVES THAT THE HOSPITAL PEER-REVIEW PROCESS IS FUTILE.

Petitioners argued unsuccessfully in the Hawaii Supreme Court that **QASEM vs. KOZAREK**, 716 F.2nd 1172, (7th Cir., 1983), decided that a doctor who is denied certain hospital privileges on the

recommendation of the credentials committees which was adopted by the board of directors for the hospital and where the doctor had the right to appeal that decision through procedures established by the hospital bylaws, the doctor did not have to appeal the decision but instead may directly file his lawsuit against the committee doctors for tortiously interfering with his contract with the hospital for which he seeks compensatory damages. Thus, **Qasem** clearly says that the doctor is not required to exhaust his administrative remedies before suing in tort and contract for damages against the peer review committee who decided that his hospital privileges should be denied or restricted. The simple reason for this is that the hospital reviewing body is not empowered to award him any damages and, hence, it would be an act of futility for

him to pursue those administrative remedies in order to get monetary damages. His best remedy and his sole remedy is in court against the offending parties who have interfered with his contract or otherwise tortiously caused him harm and damage. This view had likewise been adopted in **COWAN vs. GIBSON**, 392 S.W.2nd 307, (Mo., 1965), in which one doctor sued another for conspiracy damages without being required to first pursue his hospital remedies.

This reasoning is sound and clearly appropriate in this case. Here Dr. Hattori had told Dr. Tun that Dr. Tun would never obtain staff privileges, consequently his business was ended at Kapiolani Hospital. Moreover, the Peer Review Committee was the one that denied his privileges, and it is inconceivable that they would award him damages for

their own denial of his privileges. Such a requirement is a nullity and makes no sense in the context of this case. In fact, the Hawaii Supreme Court did not even address the issue, although they did recognize that Dr. Tun was asserting that to be the law (App. 6).

This Court clearly held in **PATSY vs. BOARD OF REGENTS OF THE STATE OF FLORIDA**, 457 U.S. 496, (1982), inter alia, that exhaustion of the State administrative remedies is not a prerequisite to an action in Federal court for damages under **42 U.S.C. §1983**. The same can be said in the case at bar with respect to Petitioners' claims against the Respondents. In addition, Petitioners have other theories of recovery, but they clearly do encompass civil rights violations under **42 U.S.C. §1983**, inasmuch as at least Respondent Queen's admits to

receiving Hill-Burton funds, has received Federal and State funds under the Medicare/Medicaid programs, and is a non-profit, private hospital exempt from certain Federal and State taxation, plus it is affiliated with the University of Hawaii School of Medicine. Accordingly, under **CHIAFFITELLI vs. DETTMER HOSPITAL, INC.**, 437 F.2nd 429, (6th Cir., 1971), receipt of Hill-Burton funds makes the hospital subject to a civil rights claim under **42 U.S.C. §1983.** To the same effect is **WEAVER vs. UNITED STATES**, 437 F.2nd 431, (8th Cir., 1971). There is a contrary decision in **ASCHERMAN vs. PRESBYTERIAN HOSPITAL OF PACIFIC MEDICAL CENTER, INC.**, 507 F.2nd 1103, (9th Cir., 1974). Other cases holding that receipt of Hill-Burton funds and other participation by the States through tax exemption status constitute State action

sufficient to subject to the hospital to a civil rights action under **42 U.S.C. §1983**, are **SIMKINS vs. MOSES H. CONE MEMORIAL HOSPITAL**, 323 F.2nd 959, (4th Cir., 1963), Cert. den., 376 U.S. 938; **SAMS vs. OHIO VALLEY GENERAL HOSITAL ASSOCIATION**, 413 F.2nd 826, (4th Cir., 1969).

SILVER vs. CASTLE MEMORIAL HOSPITAL, 53 Haw. 475, 497 P.2nd 564, (1972), likewise construed receipt of Hill-Burton funds of over $500,000 and State funds by the hospital during construction required the hospital to accord the doctor procedural due process, which not only meant the hospital was required to give him notice of the charges against him, but the hospital board must remain objective in its decision making capacity and that it "must not be tainted by its own premature decisions prior to the hearing". Thus, even the Hawaii Supreme Court

arguably must consider receipt of State and Federal funds as subjecting the private, non-profit hospital to the due process requirements of the **Fourteenth Amendment** and, hence, their actions constitute State action as used in **42 U.S.C. §1983.**

Along those lines of judicial theory, **IN re MURCHISON**, 349 U.S. 133, (1955), said in deciding on certiorari whether trial by a judge who had conducted a secret "one man jury proceeding" violated due process, said at Page 136:

> "A fair trial and a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered."

There is no question that this tenet of due process applies to even administrative agencies and hearings, **GIBSON vs. BERRYHILL**, 411 U.S. 564, (1973). In **Gibson**, increased business to the board members by reason of denial of the license to the practitioners constituted sufficient personal financial interest so as to invalidate the board's decision by reason of bias "by prejudgment and pecuniary interest that it could not constitutionally conduct hearings looking toward the revocation of appellee's licenses to practice optometry.". Hence, the Court in **Gibson** was convinced that the optometrist had no adequate administrative remedy requiring exhaustion. The same can be said in the case at bar, because quite clearly when Dr. Hattori told Dr. Tun that he would never get staff privileges at that hospital, since Dr. Hattori was Chief

of Anesthesiology, the matter of staff privileges at Kapiolani was exhausted and futile. Moreover, the Peer Review Committee was likewise tainted by bias, since they all agreed they relied exactly on what Dr. Hattori told them in reaching their conclusion to terminate or suspend Dr. Tun's privileges. In keeping with **GIBSON vs. BERRYHILL**, supra, their decision was biased, and moreover they were pecuniarily involved in the outcome, further tainting their administrative decision making capacity. The same can be said with respect to Queen's and their administrative personnel, because they all have a personal, financial interest as anesthesiologists at Queen's, and it will only inure to their benefit to exclude Dr. Tun from that hospital. They, likewise, were disqualified under **GIBSON vs. BERRYHILL**, supra. Moreover, as abundantly

pointed out in the Statement of the Case, the Queen's decision to reduce Dr. Tun's temporary privileges without notice and without a hearing in 1982 abundantly reinforces his conclusion that any appeal through their administrative procedures was futile, thereby extinguishing the exhaustion requirement, if any such existed.

This conclusion is further reinforced in **CAFFERELLO vs. U. S. CIVIL SERVICE COMMISSION**, 625 F.2nd 285, (9th Cir., 1980). There no appeal was required from a board decision because it was apparent that the board's position was not to be changed; hence, exhaustion was not required where pursuit would have been futile.

Even the Hawaii Intermediate Court of Appeals recognizes such doctrine to prevent denial of justice in **BRIGHT vs.**

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, 2 H.A. 471, 634 P.2nd 427. In fact, **Bright** also held it reversible error to grant a summary judgment on the grounds the plaintiff had not exhausted the administrative remedies, since that was an issue of fact.

In the context of hospital litigation between doctors and hospitals, some State courts have recognized the futility doctrine as it applies to exhaustion of administrative remedies, **GARROW vs. ELIZABETH GENERAL HOSPITAL AND DISPENSARY**, 79 N.J. 549, 401 A.2nd 533.

Likewise, the Alaska Supreme Court in **EIDELSON vs. ARCHER**, 645 P.2nd 171, (1982), recognized that if exhaustion of administrative remedies is futile, the doctor may still have a claim for damages. To the same effect is **WILLIS vs. SANTA ANNA COMMUNITY HOSPITAL ASSOC.**, 376 P.2nd

568, 26 Cal.Rptr. 640, which held inter alia that the physician states a common law cause of action against the hospital and its directors, administrator and other doctors where it is claimed they denied him access to the hospital facilities as a result of a conspiracy designed to restrain competition and deprive him of his practice in order to benefit competing members of the conspiracy where the defendants, pursuant to the conspiracy, terminated his hospital staff privileges and membership without any hearing or assigned reason except that they indicated to the public that he was expelled because of questionable competence and reputation.

The California Supreme Court in **WESTLAKE COMM. HOSP. vs. SUPERIOR COURT OF L.A. COUNTY**, 551 P.2nd 410, 131 Cal.Rptr. 90 (1976), reaffirmed **Willis**.

ANTON vs. SAN ANTONIO COMMUNITY HOSPITAL, 19 Cal.3rd 809, 140 Cal.Rptr. 442, 567 P.2nd 1162, also said:

> "The rule that a party must exhaust his administrative remedies prior to seeking relief in the courts 'has no application in a situation where an administrative remedy is unavailable or inadequate' *** (citations omitted)."

To permit hospital boards and committees to decide whether Dr. Tun has been defamed usurps the function of the court system by delegating judicial functions to hospital boards and peer groups.

As to Queen's, futility at work is obvious when twice in 1982 they reduced Dr. Tun's privileges without a hearing and charges apparently on the basis of Dr. Hattori's report. Then in 1983 - 84, Queen's terminated his privileges when he refused to accede to their demands to change an answer on his application. Not

only did this violate **SILVER vs. CASTLE**, supra, but Queen's violated their own By-Laws (R 104) as well.

Thus, only after he filed the lawsuit was he accorded his procedural due process under **SILVER vs. CASTLE MEMORIAL HOSPITAL**, supra.

It is therefore submitted that under **WEISS vs. YORK HOSPITAL**, 745 F.2nd 786, (3rd. Cir., 1984), such a restrictive policy decision with respect to Dr. Tun's privileges at both Queen's and Kapiolani was equivalent to a concerted refusal to deal with him, rendering their decisions and actions illegal per se under the Sherman Antitrust Act, for clearly even the medical profession is subject to the antitrust laws, **ARIZONA vs. MARICOPA COUNTY MEDICAL SOCIETY**, 457 U.S. 332, (1982).

With regard to Kapiolani and their personnel, all of their answers denied Paragraph 25 of the Amended Complaint which alleged that Dr. Hattori had told Dr. Tun that there was no way he would practice anesthesiology at Kapiolani. The answers denied such because they were without sufficient information to either admit or deny it. This alone is sufficient to raise an issue of material fact on the issue of futility. Since Queen's did not file an answer but only moved for summary judgment, again the substantial issue of fact exists on futility alone.

The Hawaii Supreme Court opinion on the issue of futility held that such issues should have been raised and argued before the hospital review committees and, moreover, the record did not show how the appellate process would have been futile

and that Dr. Tun's personal views are insufficient grounds to support his contentions. The simple answer to these holdings is that they support the conclusion that they are all issues of fact, both in the pleadings and the affidavits and focus on opinion evidence, all of which are reasons for denying motions for summary judgment as previously argued in Part I hereinabove. Admittedly, this area needs further development of facts by discovery, but the record clearly shows that there was no investigation independently done by any of the boards or doctors concerning the incompetence of Dr. Tun. All of them simply accepted what Dr. Hattori said and, therefore, it was futile to proceed, because the medical charts show that there was no cardiac arrest. If they wouldn't examine the charts and medical evidence but simply

accepted Dr. Hattori's word, the futility of appeal is obvious.

III. QUALIFIED IMMUNITY IS A QUESTION OF FACT TO BE RESOLVED AT THE TRIAL, NOT ON MOTION FOR SUMMARY JUDGMENT.

The Hawaii Supreme Court, in its Memorandum Opinion, held that **HRS §663-1.7** grants a qualified privilege to committee members and that **AKU vs. LEWIS**, 52 Haw. 366, 477 P.2nd 162, (1972), requires the Plaintiff to adduce clear and convincing proof that a defendant was motivated by malice and not by an otherwise proper purpose in order to overcome the qualified privilege. Dr. Tun had cited in his Opening Brief an extensive list of the facts and inferences establishing by clear and convincing evidence that there was evidence of malice and failure to ascertain the truth of the

facts in order to preclude application of the qualified privilege by the Respondents. In fact, the Hawaii Supreme Court was convinced that, at least as to Dr. Hattori, there was sufficient evidence to withstand the motion for summary judgment. Consequently, if Dr. Hattori is subject to liability, then failure on the part of the other hospital personnel and their hospitals to adequately investigate the claimed incompetence of Dr. Tun renders them liable, because the statute clearly requires before immunity can apply that the committee member acted "without malice after having made a reasonable effort to ascertain the truth of the facts on which he acted". Here, all the evidence was that no investigation was done by any of the peer review personnel as required by the statute. As such, this constituted clear and convincing evidence

of malice sufficient to survive the motion for summary judgment. After all, the standard for measuring qualified immunity is both objective and subjective in testing good faith, **WOOD vs. STRICKLAND**, 420 U.S. 308, (1975). In other words, in the context of this case, if the peer review personnel and the hospital knew or reasonably should have known that the action that they took against Dr. Tun in denying, suspending, or reducing his privileges would violate his constitutional rights to due process and equal protection, or if they took such action maliciously to cause the deprivation of such rights or other injury to his reputation, they lose any such qualified immunity under **HRS §663-1.7**, **WOOD vs. STRICKLAND**, supra.

Also, under such a peer review statute, "a person participating in a

review of his peers can be found to have acted in bad faith even if the procedural rights set forth in the statute were not denied, but whether these procedural rights were denied is a factor which must be considered in determining whether he acted in bad faith.", **QASEM vs. KOZAREK**, supra.

As previously cited, a motion for summary judgment is not appropriate where qualified privilege is a defense issue, **JACKSON vs. STATE OF MISSISSIPPI**, supra.

The Hawaii Supreme Court did not include within its decision that Queen's was immune from civil liability under **HRS §663-1.7**, but only held that Kapiolani and its named Defendants were so immune. As such, there is no decision by them on that issue; consequently, Petitioners argue that apparently Queen's is not immune. This issue was raised on Motion

for Reconsideration, but the Motion was denied without argument by the Hawaii Supreme Court.

Moreover, **HRS §663-1.7(c)** does not immunize the hospital for peer review, but only for communicating the results of peer review between peer groups of two hospitals. It's not clear whether the provisions of Subparagraph **(b)** of that statute apply to Subsection **(c)** concerning qualified privilege, but it is clear that Subsection **(c)** does not confer blanket immunity upon the hospitals for their actions against doctors applying for staff privileges.

HRS 663-1.7(d) also requires that the final peer review report which is adverse to the doctor be communicated to the Department of Commerce and Consumer Affairs and that if such report is superseded by resignation or voluntary

action that occurred in lieu of disciplinary action, the report shall so state. In the case at bar, no one communicated to the Department of Commerce and Consumer Affairs or to Queen's hospital that Dr. Tun had voluntarily withdrawn his application for staff privileges at Kapiolani. Hence, the statute was violated by Kapiolani and constitutes further evidence of malice as per **Qasem**. The situation is analgous to a re-publication of a falsehood defaming the doctor which subjects the hospital to liability for re-publication as per **MURPHY vs. MAUI PUB. CO.**, 23 Haw. 804, (1917).

Finally, the Hawaii Supreme Court said in its opinion that the accuracy of the report were issues for the administrative hearing. That holding is easily resolved, because Dr. Hattori had already told Dr. Tun that he would never

get privileges, consequently, everything hinges on whether exhaustion of the hospital remedies applies and, as previously argued, it does not where it is futile or tainted by bias or pecuniary interest. All of those are issues of material fact to be resolved at the trial, not upon affidavits. However, Petitioners point out that the whole action and reaction against Dr. Tun originates with Dr. Hattori. If Dr. Hattori falsely accused Dr. Tun of malpractice and none of the other Respondents independently ascertained the truth of that, they are subject to liability for republication and reaction to that originally false report. Since the action is reversed and remanded as to Dr. Hattori, it seems only logical that all other issues should likewise be remanded for trial as to all Respondents and not simply decided on the affidavits

without there ever being any discovery at all being conducted by any party. To hold otherwise is a deprivation of due process and equal protection of the judicial system which is the cornerstone of our society. If the courts of our land are not open to doctors and hospitals to resolve their damage claims, it's a sad day for American justice.

CONCLUSION

For each and all of the foregoing reasons, Petitioners request the Court issue a Writ of Certiorari to review the judgment of the Supreme Court of the State of Hawaii entered in this case.

Respectfully submitted,

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IN THE SUPREME COURT

OF THE STATE OF HAWAII

NO. 10564

THAN TUN, M.D., et. ux,

Plaintiffs-Appellants,

vs.

KAUIKEOLANI CHILDREN'S HOSPITAL, et. al.,

Defendants-Appellees.

MEMORANDUM OPINION

Plaintiffs-appellants Dr. Than Tun and Thida Swe Tun appeal from a grant of summary judgment in favor of defendants-appellees Kauikeolani Children's Hospital now known as Kapiolani Women's and Children's Medical Center (Kapiolani), Richard Davi, Paul E. Cook, Dr. Walter Shim, Dr. Stanley Chung, Dr. Mitsuo Hattori, Queen's Medical Center, Dr. John (sic) Pegg, Dr. Dan Yoshioka and Dr.

Arthur Sprague. We affirm in part and reverse in part.

I.

Dr. Tun applied for anesthesiology privileges at Kapiolani. Initially, he was granted temporary privileges but those privileges were terminated based on Dr. Hattori's observations of Dr. Tun's performance in the operating room. Dr. Chung, Chief of Surgery, relied on Dr. Hattori's observations and recommended the termination to Mr. Davi, President. Dr. Hattori, Chief of Anesthesiology, had observed Dr. Tun on two occasions and believed his performance to be unsatisfactory. Dr. Tun, stating that he did not desire to use the facilities withdrew his application without pursuing the administrative appeal process as provided under the Medical Staff By-Laws. Kapiolani formally denied Dr. Tun's

application, taking the view that Dr. Tun's letter of withdrawal was a waiver of his right to an appeal hearing.

Subsequent to the denial of staff privileges to Dr. Tun by Kapiolani, Dr. Tun applied to Queen's Medical Center for anesthesiology privileges. On the aplication form, Dr. Tun answered "No" to the question of whether his privileges had ever been revoked, denied or suspended at any other hospital. Dr. Hattori, in responding to Queen's questionnaire, stated that, "I don't believe Dr. Tun is ready to give anesthesia for children unless he seeks further training in the field of pediatric anesthesiology."

Queen's Credentials Committee recommended that Dr. Tun's application for privileges be denied. The Medical Executive Committee affirmed the recommendation and notified Dr. Tun of the

denial based on, inter alia, unethical conduct in answering the question improperly. Dr. Tun was advised that he had a right to request an informal hearing before the Medical Executive Committee and a full hearing before the Board of Directors after the hearing and decision by the Medical Executive Committee. A hearing before the Medical Executive Committee was scheduled at the request of Dr. Tun but Dr. Tun failed to attend the hearing. Instead, Dr. Tun commenced action for damages in the curcuit court.

Appellants sued Queen's, Kapiolani, and their respective doctors and administrators for monetary damages based on a multiple causes of action, summarized as follows: libel, slander and defamation; improper revocation of privileges; violation of due process; conspiracy to deny Dr. Tun his

constitutional rights and to restrict interstate business; intentional infliction of emotional distress; malicious prosecution and abuse of process; breach and tortious breach of contract; negligence; unfair and deceptive trade practices; loss of consortium; promissory estoppel; and intentional, malicious, wanton and willful acts of defendants. The trial court granted summary judgment in favor of defendants based on Dr. Tun's failure to exhaust the hospitals' administrative remedies. We affirm as to all defendants except Dr. Hattori.

II.

Appellants assert that Dr. Tun is excused from exhausting the available administrative remedies for the following reasons: (1) the administrative review would have been futile and would have

caused undue hardship; (2) Dr. Tun was deprived of procedural due process; (3) appellants may sue the peer review committee for damages without exhausting the administrative remedies; and (4) the defendants acted with malice against Dr. Tun under Hawaii Revised Statutes (HRS) § 663-1.7(b)[1].

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1. The pertinent part of § 663-1.7(b) reads:

> (b) There shall be no civil liability for any member of a peer review committee for any acts done in furtherance of the purpose for which the committee was established; provided that:
>
> (1) The member was authorized to perform in the manner in which he did; and
>
> (2) The member acted without malice after having made a reasonable effort to ascertain the truth of the facts upon which he acted.

III.

Was Dr. Tun bound to exhaust the administrative remedies available to him? And if so, would the pursuit of administrative appeals have been an act of futility or cause undue hardship?

It is generally accepted that a physician must exhaust available internal remedies afforded by the hospital before bringing a suit for damages. Westlake Community Hospital v. Superior Court of Los Angeles County, 17 Cal. 3d. 465, 131 Cal. Rptr. 90, 551 P.2d 410 (1976); Eidelson v. Archer, 645 P.2d 171 (Alaska 1982). However, the exhaustion of remedies requirement has been excused where the administrative review process is either inadequate or would be futile to the certainty of an adverse decision. Eidelson, supra, at 181; see also Glendale City Employees' Ass'n v. City of Glendale,

15 Cal. 3d 328, 124 Cal. Rptr. 513, 540 P.2d 609 (1975).

Appellants contend that the available administrative appeal procedure would have been futile since Dr. Tun felt that Queen's had made a prejudgment, and that Queen's did not conduct a sufficient investigation prior to reducing his privileges. It was also apparent that Dr. Tun's and Queen's interpretation of the application differed. These contentions by appellants are issues which should have been raised and argued before the Medical Executive Committee and ultimately before the Board of Directors if necessary. Moreover, appellants failed to show by any supporting evidence on the record specifically how or why such an appeal process would have been futile, or how Queen's had already prejudged Dr. Tun. Dr. Tun's personal inclination or views

are insufficient grounds to support appellants' contentions.

As to Kapiolani, here again appellants fail to give any specific grounds as to why the administrative appeal process would have been futile or would have put Dr. Tun in undue hardship to pursue his administrative appeal. Instead, appellants asserted that since Dr. Tun withdrew his application, pursuing any administrative remedy was unnecessary. Yet, the record shows that Dr. Tun "withdrew his application" after notice of the termination of his temporary privileges. Therefore, any disagreement with Kapiolani should have been presented at a hearing before an Ad Hoc Committee of the medical staff. Dr. Tun failed to avail himself of this hearing as provided in the By-Laws.

IV.

Was Dr. Tun denied his right to procedural due process?

The decision of a hospital board will be upheld unless the doctor involved was denied procedural due process or the hospital abused its discretion. Silver v. Castle Memorial Hospital, 53 Haw. 475, 497 P.2d 564 (1972). Procedural due process requires that a doctor whose privileges are being revoked or who is being denied appointment or reappointment to the medical staff be given an opportunity to appeal the denial at a hearing. Further, the hearing must comport with certain procedural safeguards such as timely notice of hearing and a statement specifying the reasons for the initial decision of the hospital board. Silver at 485, 497 P.2d at 571.

Appellants claim that Dr. Tun was denied due process when Kapiolani terminated his temporary privileges without written charges or a proper hearing, but the record indicates that the notification by Kapiolani comported with the procedural due process requirements in Silver. Kapiolani notified Dr. Tun that the termination of his temporary privileges was due to two unacceptable anesthetic cases performed by him at the hospital and observed by Dr. Hattori. The notice informed Dr. Tun of his right to request a hearing within thirty days, and that failure to request a hearing would constitute a waiver of his right to do so.

Although Dr. Tun's privileges were actually terminated prior to hearing, the hospital took such action "in the best interest of patient care." We do not consider this an abuse of discretion by

Kapiolani whose physicians and supervisors were in the best position to make a decision for the benefit of their patients.

As to Queen's, appellants claim that Dr. Tun's privileges were denied on the basis of his application rather than his competency. This is a matter within the hospital's discretion. Further, the record shows that Queen's denied Dr. Tun's privileges due to serious questions regarding his ethical conduct. Queen's informed Dr. Tun that they concluded that he had falsified information and specified the grounds upon which they had based their conclusion. Queen's further informed Dr. Tun of his right to request a hearing with the Medical Executive Committee and the right to review his own staff file. We find no denial of due process or abuse of discretion here.

V.

Appellants contend that Kapiolani and its named defendants acted with malice. Under HRS § 663-1.7(b), Kapiolani and the members of its peer review committee are not liable for acts done in furtherance of the committee's purpose and without malice. This section confers a qualified privilege on the committee members, placing the burden on the plaintiff to adduce clear and convincing proof that the defendant was motivated by malice and not by an otherwise proper purpose. See Aku v. Lewis, 52 Haw. 366, 477 P.2d 162 (1970). The by-laws provide similar immunity, excepting acts done in malice and without good faith.

Appellants also contend that Kapiolani failed to investigate the accuracy of Dr. Hattori's report. The action of Kapiolani in relying on the

Chief of Surgery's recommendation comports with procedure set down in the by-laws. The accuracy and truth of the report by Dr. Hattori were isues appropriate for an appeal hearing. At the hearing, Dr. Tun would have had the opportunity to present evidence and witnesses in his favor.

Based on the record, we find no supporting evidence of malice or lack of good faith on the part of Kapiolani or members of its peer review committees. We conclude that under HRS § 663.7(b) Kapiolani and its named defendants are immune from the civil liabilities claimed by appellants.

VI.

Appellants further contend that Dr. Hattori was motivated by anger and acted with malice in writing a false report. Dr. Hattori is not a member of Kapiolani's peer review committee and therefore he

does not fall under HRS § 663-1.7(b). We, therefore, hold that the trial court committed error in granting summary judgment in favor of Dr. Hattori solely on the basis of appellants' failure to exhaust the administrative remedies available to them. We remand for proceedings anew on the causes of action claimed by the apellants against Dr. Hattori.

VII.

Appellants' other claims are without merit.

Affirmed in part, reversed in part, and remanded for proceedings not inconsistent with this opinion.

DATED: Honolulu, Hawaii, June 17, 1986.

/s/ Herman Lum
/s/ Edward H. Nakamura
/s/ Frank D. Padgett
/s/ Yoshimi Hayashi
/s/ James H. Wakatsuki

IN THE SUPREME COURT

OF THE STATE OF HAWAII

NO. 10564

THAN TUN, M. D., et. ux.,

Plaintiffs-Appellants,

vs.

KAUIKEOLANI CHILDREN'S HOSPITAL, et. al.,

Defendants-Appellees.

ORDER

Defendant-appellee Hattori's motion for reconsideration filed on June 26, 1986, and Plaintiffs-appellants' motion for reconsideration filed on June 27, 1986, are hereby denied.

DATED: Honolulu, Hawaii, July 7, 1986.

/s/ Herman Lum
/s/ Edward H. Nakamura
/s/ Frank D. Padgett
/s/ Yoshimi Hayashi
/s/ James H. Wakatsuki

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

CIVIL NO. 84-0181

THAN TUN, M.D., et. ux,

Plaintiffs-Appellants,

vs.

KAUIKEOLANI CHILDREN'S HOSPITAL, et. al.,

Defendants-Appellees.

ORDER GRANTING DEFENDANTS' QUEEN'S MEDICAL CENTER, JON PEGG, M.D., DAN YOSHIOKA, M.D., AND ARTHUR SPRAGUE, M.D.'S MOTION TO DISMISS COMPLAINT FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

Defendants Queen's Medical Center, Jon Pegg, M.D., Dan Yoshioka, M.D. and Arthur Sprague, M.D.'s Motion to Dismiss Complaint for Failure to State a Claim upon which Relief can be granted, having come on for hearing before the Honorable Frank T. Takao on November 13, 1984, and the Court having reviewed the pleadings

and records on file and the Memoranda and Affidavits submitted by counsel, and the Court having heard the arguments of Counsel, and the Court being fully advised in the premises, and the Court having found that:

1) The Queen's Medical Center Medical-Dental Staff Bylaws provide the procedure to be followed for the processing of a physician's application for staff membership and clinical privileges;

2) The Queen's Medical Center Medical-Dental Staff Bylaws provide an administrative remedy to be followed in the event a peer review committee recommends an adverse decision;

3) The Queen's Medical Center adhered to their Bylaws by providing timely notice and opportunity for hearing at each required level of the peer review

process.

4) Plaintiff failed to exhaust the administrtive remedies provided under these Bylaws before resorting to Court.

5) A physician applying for staff membership and clinical privileges must exhaust the administrative remedies provided under the hospital bylaws before resorting to judicial intervention.

IT IS HEREBY ORDERED that Plaintiffs' claim against Defendants Queen's Medical Center, Jon Pegg, M.D., Dan Yoshioka, M.D. and Arthur Sprague, M.D. is dismissed for failure to exhaust the administrative remedies as provided under the Medical-Dental Staff Bylaws of Queen's Medical Center.

Pursuant to Hawaii Rules of Civil Procedure Rule 12(b)(6), Defendants' Motion to Dismiss shall be treated as one for summary judgment as provided in Hawaii

Rules of Civil Procedure Rule 56 and the Plaintiffs' Complaint is hereby dismissed, with prejudice, as to Defendants Queen's Medical Center, Jon Pegg, M.D., Dan Yoshioka, M.D. and Arthur Sprague, M.D. The Court directs the clerk to enter judgment in accordance with the Hawaii Rules of Civil Procedure Rule 58.

DATED: Honolulu, Hawaii, December 6, 1984.

/s/ Frank T. Takao
Judge of the Above-Entitled Court

APPROVED AS TO FORM:
(unsigned)
HAROLD GOBLE
Attorney for Plaintiffs

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

CIVIL NO. 84-0181

THAN TUN, M.D., et. ux,

Plaintiffs-Appellants,

vs.

KAUIKEOLANI CHILDREN'S HOSPITAL, et. al.,

Defendants-Appellees.

AMENDED ORDER GRANTING MOTION FOR SUMMARY JUDGMENT AND DIRECTING ENTRY OF FINAL JUDGMENT

Defendants Kauikeolani Children's Hospital, Kapiolani Women's and Children's Medical Center, Richard Davi, Paul E. Cook, Dr. Walton K.T. Shim, and Dr. Stanley M.K. Chung's Motion for Summary Judgment, filed herein on January 8, 1985, and the Joinder of Dr. Mitsuo Hattori, filed on January 21, 1985, having been heard before the Honorable Edwin Honda on February 19, 1985, the parties having been

represented by their respective counsel, and the Court having considered the memoranda, affidavits, exhibits and the arguments of counsel,

IT IS HEREBY ORDERED that the Motion for Summary Judgment by Defendants Kauikeolani Children's Hosital, Kapiolani Women's and Children's Medical Center, Richard Davi, Paul E. Cook, Dr. Walton K.T. Shim, and Dr. Stanley M.K. Chung and Joinder of Dr. Mitsuo Hattori are GRANTED. This Order Granting Motion for Summary Judgment and Directing Entry of Final Judgment is hereby entered in favor of Defendants Kauikeolani Children's Hosital, Kapiolani Women's and Children's Medical Center, Richard Davi, Paul E. Cook, Dr. Walton K.T. Shim, Dr. Stanley M.K. Chung and Dr. Mitsuo Hattori against Plaintiffs Than Tun and Thida Swe Tun.

IT IS FURTHER ORDERED, pursuant to Hawaii Rules of Civil Procedure, Rule 54(b), there being no just reason for delay in the entry of a final judgment, that final judgment be entered against Plaintiffs Than Tun and Thida Swe Tun and in favor of Defendants Kauikeolani Children's Hospital, Kaiolani Women's and Children's Medical Center, Richard Davi, Paul E. Cook, Dr. Walton K.T. Shim, Dr. Stanley M.K. Chung and Dr. Mitsuo Hattori.

DATED: Honolulu, Hawaii, Apr 2, 1985.

/s/ Edwin H. Honda
Judge of the Circuit Court
of the First Circuit

APPROVED AS TO FORM
AND CONTENT:
/s/ Harold W. Goble
HAROLD GOBLE, ESQ.
Attorney for Plaintiff

/s/ Rene McWade
DENNIS E.W. O'CONNOR, ESQ.
JOHN A. HOSKINS, ESQ.
H. WILLIAM GOEBERT, JR., ESQ.
RENE McWADE, ESQ.
Attorneys for Queen's Medical Center,
John (sic) Pegg, M.D., Dan Yoshioka, M.D.,
and Arthur Sprague, M.D.

/s/ Jeffrey T. Ono
EDMUND BURKE, ESQ.
JEFFREY T. ONO, ESQ.
Attorneys for Mitsuo Hattori, M.D.

Hawaii Revised Statutes, §663-1.7:

Professional society; peer review committee; no liability; exceptions. (a) As used in this section, "professional society" or "society" means any association or other organization of persons engaged in the same profession or occupation, or specialty within a profession or occupation, a primary purpose of which is to maintain the professional standards of the persons engaged in its profession or occupation or specialty practice; and "peer review committee" or "committee" means a committee created by a professional society, or by the medical or administrative staff of a licensed hospital, whose function is to maintain the professional standards established by the bylaws of the society or the hospital of the persons engaged in its profession

or occupation, or area of specialty practice, or in its hospital.

(b) There shall be no civil liability for any member of a peer review committee for any acts done in furtherance of the purpose for which the committee was established; provided that:

(1) The member was authorized to perform in the manner in which he did; and

(2) The member acted without malice after having made a reasonable effort to ascertain the truth of the facts upon which he acted.

(c) This section shall not be construed to confer immunity from liability upon any professional society or hospital, nor shall it affect the immunity of any shareholder or officer of a professional corporation; provided, however, there shall be no civil liability

for any professional society or hospital in communicating any conclusions reached by one of its peer review committees relating to the conformance with professional standards of any person engaged in the profession or occupation of which the membership of the communicating professional society consists, to a peer review committee of another professional society whose membership is comprised of persons engaged in the same profession or occupation, or to a duly constituted governmental board or commission or authority having as one of its duties the licensing of persons engaged in that same profession or to a government agency charged with the responsibility for administering a program of medical assistance in which services are provided by private practitioners.

(d) The highest level peer review committee of a medical society, hospital, or other health care institution shall report in writing every adverse decision made by it to the board of medical examiners within thirty days after the adverse decision is verified by the committee. Failure to comply with this subsection shall be a violation punishable by a fine of not more than $100 for each member of the committee. [L 1970, c 60, §1; am L 1975, c 170, §2; am L 1976, c 219, §18]

United States Code, Title 42, §1983:

Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any of the rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any act of Congress applicable exclusively to the Distirct of Columbia shall be considered to be a statute of the District of Columbia. (As amended Dec. 29, 1979, P. L. 96-170. §1.93 Stat. 1284)

Hawaii Rules of Civil Procedure, Rule 56:

SUMARY JUDGMENT

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) *** (omitted as not pertinent)

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidvaits shall be made on

personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidvaits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary

judgment, if appropriate, shall be entered against him.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) *** (omitted as not pertinent)